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PAGE

BLANK

PAGE

INDEX

SUBJECT INDEX

CITATIONS

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 831

FRANCIS EDDIE SPECHT,

Petitioner,

vs.

WAYNE K. PATTERSON, Warden, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Supplemental Statement on Questions Presented

Respondent's brief injects uncertainty and confusion into the case by contending that the issues as framed in the lower courts and on petition and response in this Court are not properly before the Court. The Attorney General says in his answer brief, page 2:

"... We do not agree with petitioner's assertion ... that petitioner was not afforded a hearing on his claims

as to what did or did not occur at that hearing. No official record of his sentencing hearing or hearings exists and no evidentiary hearing has been held by any court as to what did or did not occur at his hearing to impose sentence and, therefore, any questions in regard thereto are not properly before this Court."

The State correctly says no evidentiary hearing has ever been held to determine what occurred at Petitioner's sentencing. But the reason for this is that the State has consistently argued in this and other cases that due process does not apply to sentencing and the courts have consistently so held. The petition in this case was dismissed in the District Court on a point of law and without an evidentiary hearing. Chief Judge Arraj stated in his memorandum (R. 39-40) that although Petitioner's argument was not totally unpersuasive, his contentions had been considered thoroughly by the state courts and that the decision in *Trueblood* v. *Tinsley,* 316 F.2d 783 (10th Cir. 1963), and *Trueblood* v. *Tinsley,* 148 Colo. 503, 366 P.2d 655 (1961), *cert. denied,* 370 U.S. 929 (1962), upholding the constitutionality of the Sex Offender Sentencing Act bound the court.

The Court of Appeals stated the issue presented to it concisely as follows:

"The statute does not provide or contemplate any hearing on the exercise of the discretion of the court to impose sentence under the Act in lieu of sentence authorized under 40-2-32.

"On the constitutional issue the contention is to the effect that one convicted of a 40-2-32 offense is entitled to a due process hearing on the exercise of the discretion committed to the sentencing court."

and framed the questions on certiorari by its holding:

> "We uphold the constitutionality of the Act . . . .
>
> • • • • •
>
> "In determining whether a convicted person shall receive an indeterminate sentence based upon a recognized classification or a ten-year maximum sentence, the sentencing court is free to utilize investigational techniques unhampered by due process requirements." *Specht* v. *Patterson*, 357 F.2d 325, 326 (10th Cir. 1966), R. 49-50. (Citing *Williams* v. *New York*, 337 U.S. 241 (1949).)

Petitioner ultimately brought the case here on certiorari to obtain reversal of the Court of Appeals' decision that the State's position is correct and that *Williams* v. *New York* is controlling. He continues to assert that due process requires that he be afforded a right to a hearing with the right of confrontation, evidence production, and evidence testing by cross-examination either by explicit statutory guarantee or by judicial construction.

All courts below have thought that it is unnecessary and irrelevant to inquire into the procedural fairness of proceedings by which Petitioner and others like him have been sentenced. This case is here (1) to establish that such inquiry is relevant because due process does require a hearing and (2) to demonstrate that because Colorado and lower federal courts have interpreted the Sex Offender statute so as not to require any hearing, no defendant, including Petitioner, has been or will be afforded due process unless it is required to be done by this Court.

ARGUMENT

I.

The Colorado Sex Offender Sentencing Act Does Not Provide for a Hearing or for Disclosure of the Facts Relied on to Impose Its Enhanced Penalty and the Reported Decisions in Petitioner's Case Clearly Establish That His Attempts to Obtain These Rights Have Been Denied on the Ground That He Is Not Entitled to Them.

The State suggests throughout its brief that the Sex Offender statute provides for a hearing and that there is no reason to believe that Petitioner did not receive one in that the record does not disclose what occurred at his sentencing. See Brief for Respondents, pp. 2, 3, 5, 6, 11 and 17. The suggestion is simply erroneous. Nowhere does the statute provide for a hearing. What it does provide is an arraignment. See Section 39-19-5(1), Appendix A, Brief for Petitioner. Apparently this is what the State refers to on page 5 of its brief as "arraignment or hearing for imposition of sentence." That Petitioner had an arraignment at sentencing as opposed to the hearing for which Petitioner here contends conclusively appears in statements of the Colorado Supreme Court:

> "The record affirmatively discloses that Specht, along with his counsel, was present in open court when sentence was imposed and such is compliance with the statutory requirement that he be 'arraigned' at the time of sentence under C.R.S. '53, 39-19-1, et seq." *Specht* v. *Tinsley,* 153 Colo. 235, 385 P.2d 868 (1964).

To be contrasted is the Colorado Supreme Court's view of what constitutes a "hearing":

> "The word contemplates not only the privilege to be present when the matter is being considered *but the right to present one's contention and support the same by proof and argument.*" (Emphasis added.) *Brown* v. *Brown,* 422 P.2d 634, 635 (Colo. 1967).

The State's suggestion, in addition to being erroneous, constitutes a complete reversal of its position in the lower courts, both state and federal. The State, prior to its brief in this Court has always maintained that a defendant subject to the Sex Offender statute is not afforded a hearing and that it is absurd to suggest that due process requires a different rule.

> "Pellucidly, *Colorado's failure* to attach to the imposition of a sentence under the Sex Offenders Act all of the basic aspects of procedural due process offends no generally accepted concepts of basic standards of justice." Brief of Appellee, p. 6, *Specht* v. *Patterson,* 357 F.2d 325 (10th Cir. 1966). (Emphasis added.)

In a somewhat concessionary tone the State now suggests that "due process may require that defendant be given a copy of the psychiatrist's report and the pre-sentence report," and that, "It can be said that, unless such is done, no adequate opportunity to test the veracity of the informational process is afforded." See Brief for Respondent, p. 11. The State goes on to say that in this case the question is academic, and to create the impression that in Colorado the question is an open one which has not been presented to the Colorado courts, or that the state courts would afford a defendant these rights if he sought them

there. This is not accurate. Petitioner quotes the following from these same attorneys' brief to the Colorado Supreme Court in *Specht* v. *Tinsley*:

> "Under petitioner's fourth heading he alleges that the sentencing procedure denied him of equal protection of the laws and due process. His first basis for this attack is that at the time of sentencing he was not afforded due process. *This assertion is apparently based on the false premise that the sentencing must be conducted in accordance with the requirements of a trial, such as examination of the psychiatric report and right to cross-examine the expert submitting the report.* We know of no principle which requires an opportunity to be heard as to the information upon which a judge may properly rely or utilize in determining the proper sentence." Brief for Defendant-in-Error, p. 4, *Specht* v. *Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963). (Emphasis added.)

Although the Colorado Court did not discuss this question in detail in its opinion, it upheld the statute against all due process attacks levelled by Specht. Having successfully argued to the Colorado court that Specht's assertions there were based on a "false premise," the Attorney General now seeks to concede enough of the point to avoid a decision here while maintaining his former position with the assertion that the point is academic.

II.

Equal Protection Requires the Retention of Classification Standards in the Sex Offender Statute; Due Process Requires the Employment of a Fair Procedure to Determine Factually Whether Petitioner Is Within the Class Punished by the Statute.

Petitioner has contended that the Sex Offender Sentencing Act requires a finding of fact which is separate from and in addition to facts required to be found for the original conviction, and that the Act unconstitutionally permits the finding of fact without a hearing incorporating procedural fairness. The State argues, however, that if Colorado eliminated the classifications in the Act and placed the imposition of the alternative sentence within the discretion of the trial court or amended the Indecent Liberties Act so as to provide within it the alternative sentence now provided in the Sex Offender Sentencing Act, Petitioner's argument would evaporate.

The Colorado Legislature has not so amended the Indecent Liberties Act or the Sex Offender Sentencing Act. Furthermore, no such easy device exists by which to dispel Petitioner's argument as is suggested by Respondent. Initially, equal protection requires classification upon some rational basis for distinguishing Petitioner from others convicted of sex crimes, but not sentenced under the challenged Act. *Morey* v. *Doud,* 354 U.S. 457 (1957); *Walters* v. *St. Louis,* 347 U.S. 231 (1954); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Trueblood* v. *Tinsley,* 148 Colo. 503, 366 P.2d 655 (1961); *Vanderhoof* v. *People,* 152 Colo. 147, 380 P.2d 903 (1963).

In the *Vanderhoof* case the Sex Offender statute was upheld *because* it contained the very legislative classifications which the State now lightly proposes might be eliminated in order to defeat Petitioner's contention. In order to overcome an argument in that case that the classification in the statute is arbitrary because it is determined in the discretion of the court, the same attorneys who represent Respondent here said:

> "The classification is not determined by the trial court. The trial court makes a finding of fact only to determine whether or not a defendant comes within the classification set forth in the Act."

Brief of Defendant in Error, p. 2, *Vanderhoof* v. *People*, 152 Colo. 147, 380 P.2d 903 (1963). Now that Petitioner has suggested that the finding of fact is a critical one which permits an enhanced sentence and should, therefore, be clothed with the requirements of fairness embodied in due process, the State seeks to minimize its importance by calling the fact-finding process a label attached by Petitioner to the thought processes of the sentencing judge in determining sentence. See Brief for Respondent, p. 16. Such inconsistency cannot go unchallenged. It is the State's interpretation of the Act which has been uniformly accepted by the Colorado Supreme Court in its decisions and has been imported into the law by administration and application.

The point which Petitioner is accused of belaboring is that the process by which he is determined to be within the statutory classification must be governed by rules of elementary fairness. The State apparently represents to the Court that "responsible officials" recommend procedures

such as the ones followed in Colorado. See Brief of Respondent, Appendix B, referring among other things to the Model Penal Code.

Indeterminate terms of sentence similar to that imposed upon Petitioner are dealt with by the Model Penal Code in terms of an "extended term" of imprisonment as a device for dealing with the more difficult criminal. See A.L.I. MODEL PENAL CODE, § 6.07 and Comments 1-4, pp. 23-26, and § 7.03 and Comment 1, pp. 37-38, T.D. No. 2 (1954). See also A.L.I. MODEL PENAL CODE, § 6.07, p. 43 and § 7.03, p. 49, T.D. No. 4 (1955). The Code authorizes an extended sentence for a term of years, varying between stated minima and maxima depending on the degree of crime, if the court finds that the defendant is a persistent offender, a professional criminal, or a dangerous mentally abnormal person, whose commitment for an extended term is necessary for protection of the public. The procedures established in the Model Penal Code for imposing the extended sentence differ greatly from Colorado procedure. They are set forth in A.L.I. MODEL PENAL CODE, § 7.07, T.D. No. 2, p. 52 (1954); T.D. No. 4, p. 55 (1955). Section 7.07 is entitled "Procedure on Sentence; Pre-Sentence Investigation and Report; Remand for Psychiatric Examination; Transmission of Records to Department of Correction."

Subsections 5 and 6 are directly pertinent to the present case and provide as follows:

> "(5) Before imposing sentence, the Court *shall advise the defendant* or his counsel of the factual contents and conclusions of any pre-sentence investigation or psychiatric examination *and afford fair opportunity*, if the defendant so requests, *to controvert them.* The

sources of confidential information need not, however, be disclosed.

"(6) The Court shall not impose a sentence for an extended term unless the ground therefor has been established *at a hearing* after the conviction of the defendant *and on written notice to him of the ground proposed.* Subject to the limitation of paragraph (5) of this section, *the defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.*" (Emphasis added.)

The reporter comments that disclosure of the factual contents and conclusions of the pre-sentence report and psychiatric report are essential to elementary fairness. He recommends that "fairness demands a hearing focused on the precise question of the existence of the grounds for such a sentence, with notice to the defendant of the ground proposed." A.L.I. MODEL PENAL CODE, § 7.07, Comments 2 and 3, pp. 54-55, T.D. No. 2 (1954). See also § 7.03, Comment, p. 42, T.D. No. 2 (1954), to the effect that due process *requires* a hearing. In the case cited by the Reporter, *United States* v. *Claudy,* 204 F.2d 624 (3d Cir. 1953), the question was whether due process required notice and hearing prior to imposition of an enhanced penalty for a second offense. Speaking of sentencing procedure the Court said:

"It is reasoned that at this stage the court is determining the extent of culpability after guilt of a crime has been established. Accordingly, the tendency has been to move from the stringent requirements of due process before conviction toward the greater latitude normally allowed in sentencing in cases like *Williams*

> v. *People of State of New York*, 1949, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337, *where, in the absence of any question of possible liability to enhanced penalty,* the sentencing judge is permitted to fix punishment, up to a statutory maximum *already authorized by the verdict* . . . without informing the convicted person what data is being considered or granting him any hearing thereon. At the same time it is established *that even after conviction the due process clause imposes some significant restraint to assure the essential fairness of the procedure by which a judge shall exercise discretion in fixing* punishment within permissible limits . . . .
>
> "Such restraint is the more imperative . . . when the challenged sentence cannot lawfully be imposed upon the basis of the finding of guilty as charged in the indictment without more. *Here there remains after conviction an issue to be tried with facts to be proved in order to elevate the offense to the aggravated class defined and punished by the Habitual Criminal Act.*" 204 F.2d 624, 627-628.

This interpretation of what is required by elementary fairness fully comports with Petitioner's. He seeks by way of relief nothing more than a judicial declaration that elementary fairness, in the form of due process of law, require disclosure to him of the grounds upon which it is proposed that he be sentenced and an opportunity such as is given in Section 7.07 of the Model Penal Code and in *Claudy* to test and rebut the information on which the court acts in imposing an extended sentence.

Conclusion

Petitioner has unsuccessfully argued to the lower courts that persons convicted of a crime may not constitutionally be subjected to enhanced penalties unless the State provides a fair procedure incorporating hearing, disclosure of evidence used against them, and the right to rebut such evidence by cross-examination and by production of evidence of their own.

Respondent has successfully argued that since due process does not pertain to the sentencing process, it is irrelevant to inquire into the question of what constitutes a fair procedure for enhanced penalty sentencing.

Petitioner was sentenced under Respondent's theory of the law and all his attempts to challenge that theory have been summarily rejected on the basis of Respondent's premise that due process does not pertain to sentencing.

Under the authority of this Court's rule in *Williams* v. *New York*, the lower courts have permitted Petitioner and others to be sentenced to enhanced punishments without the procedural safeguards sought by Petitioner. It has become necessary for this Court (1) to clarify the extent, if any, to which *Williams* v. *New York* applies to recidivism, mental abnormality and other like criminal proceedings, (2) to decide whether defendants in those proceedings have any due process rights, and (3) to specify what, if any, rights may be afforded.

Petitioner submits that recent decisions of this Court in *Oyler* v. *Boles*, 368 U.S. 448 (1962); *Chandler* v. *Fretag*, 348 U.S. 3 (1959); and *Kent* v. *United States*, 383 U.S. 541 (1966), clearly point the way for decision in his case. The decision of the Court of Appeals must be reversed.

Respectfully submitted,

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